

Sep 04, 2018

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

GINGER B.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:17-cv-03128-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 17, 21

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 17, 21. The parties consented to proceed before a magistrate judge. ECF No. 4. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion, ECF No. 17, and grants Defendant's Motion, ECF No. 21.

## JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

## STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless  
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."  
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's  
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

### 6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within  
8 the meaning of the Social Security Act. First, the claimant must be "unable to  
9 engage in any substantial gainful activity by reason of any medically determinable  
10 physical or mental impairment which can be expected to result in death or which  
11 has lasted or can be expected to last for a continuous period of not less than twelve  
12 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be  
13 "of such severity that he is not only unable to do his previous work[, ] but cannot,  
14 considering his age, education, and work experience, engage in any other kind of  
15 substantial gainful work which exists in the national economy." 42 U.S.C. §  
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to  
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work  
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20  
2 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis  
4 proceeds to step two. At this step, the Commissioner considers the severity of the  
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from  
6 “any impairment or combination of impairments which significantly limits [his or  
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to  
8 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy  
9 this severity threshold, however, the Commissioner must find that the claimant is  
10 not disabled. 20 C.F.R. § 416.920(c).

11 At step three, the Commissioner compares the claimant’s impairment to  
12 severe impairments recognized by the Commissioner to be so severe as to preclude  
13 a person from engaging in substantial gainful activity. 20 C.F.R. §  
14 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the  
15 enumerated impairments, the Commissioner must find the claimant disabled and  
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does not meet or exceed the  
18 severity of the enumerated impairments, the Commissioner must pause to assess  
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),  
20 defined generally as the claimant’s ability to perform physical and mental work

activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is

capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### ALJ’S FINDINGS

On July 3, 2013, Plaintiff protectively filed an application for Title XVI supplemental security income benefits, alleging an onset date of September 29, 2012. Tr. 197-210. The application was denied initially, Tr. 85-98, 118-25, and on reconsideration, Tr. 99-113, 127-32. Plaintiff appeared at a hearing before an administrative law judge (ALJ) on November 12, 2015. Tr. 39-73. On January 26, 2016, the ALJ denied Plaintiff’s claim. Tr. 17-38.

At step one of the sequential evaluation process, the ALJ found Plaintiff has not engaged in substantial gainful activity since July 3, 2013, the application date. Tr. 22. At step two, the ALJ found Plaintiff has the following severe impairments: affective disorder and anxiety disorder. *Id.* At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 23. The ALJ then concluded that Plaintiff has the RFC to perform a full range of work at all exertional limitations but with the following nonexertional limitations:

[S]he can maintain concentration persistence or pace in 2-hour increments for simple repetitive tasks throughout an 8-hour workday; she can work superficially and occasionally with the general public; superficial means she can refer the public to others to respond to demands/requests but she is not

1 having to resolve those demands/requests; she can occasionally interact with  
2 supervisors and with occasional interaction, she can response appropriately  
3 to supervisor criticism; she can work in the same room with unlimited  
4 number of coworkers but not in coordination of work activity with her  
5 coworkers; and she can respond to simple workplace changes as may be  
6 required for simple repetitive task work.

7 Tr. 24.

8 At step four, the ALJ found Plaintiff is unable to perform any past relevant  
9 work. Tr. 30. At step five, the ALJ found there are jobs that exist in significant  
10 numbers in the national economy that Plaintiff can perform, such as industrial  
11 cleaner, kitchen helper, and laundry worker II. Tr. 31. The ALJ concluded  
12 Plaintiff was not under a disability, as defined in the Social Security Act, from July  
13 3, 2013 through January 26, 2016, the date of the ALJ's decision. Tr. 31-32.

14 On May 26, 2017, the Appeals Council denied review of the ALJ's decision,  
15 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes  
16 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

### 17 ISSUES

18 Plaintiff seeks judicial review of the Commissioner's final decision denying  
19 her supplemental security income benefits under Title XVI of the Social Security  
20 Act. Plaintiff raises the following issues for review:

1. Whether the ALJ properly evaluated whether Plaintiff's impairments  
meet or medically equal the severity of a listed impairment;
2. Whether the ALJ properly evaluated Plaintiff's symptom complaints; and

3. Whether the ALJ properly evaluated the medical opinion evidence.

ECF No. 17 at 1.

## DISCUSSION

### A. Listed Impairments

Plaintiff faults the ALJ for finding at step three that Plaintiff's impairments did not meet or medically equal the severity of a listed impairment. ECF No. 17 at 5-9. At step three, the ALJ must determine if a claimant's impairments meet or equal a listed impairment. 20 C.F.R. § 416.920(a)(4)(iii). The Listing of Impairments "describes each of the major body systems impairments [which are considered] severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education or work experience." 20 C.F.R. § 416.925. To meet a listed impairment, a claimant must establish that she meets each characteristic of a listed impairment relevant to her claim. 20 C.F.R. § 416.925(d). If a claimant meets the listed criteria for disability, she will be found to be disabled. 20 C.F.R. § 416.920(a)(4)(iii). The claimant bears the burden of establishing she meets a listing. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

The ALJ concluded that Plaintiff's mental impairments, considered singly and in combination, do not meet or medically equal the criteria of Listing 12.04



1 (affective disorders) or Listing 12.06 (anxiety-related disorders). Tr. 23. Plaintiff  
2 challenges the ALJ's consideration of the Paragraph B criteria. ECF No. 17 at 5-9.

3 The Paragraph B criteria for either listing are met if the impairment results in  
4 at least two of the following: marked restriction of activities of daily living;  
5 marked difficulties in maintaining social functioning; marked difficulties in  
6 concentration, persistence, or pace; or repeated episodes of decompensation, each  
7 of extended duration. 20 C.F.R. § 404, Subpart P, Appendix I. "Marked" means  
8 more than moderate but less than extreme. *Id.*

9 The ALJ found Plaintiff had mild restriction in activities of daily living. Tr.  
10 23. The ALJ observed Plaintiff was independent in her personal care, cared for her  
11 three school-aged children, prepared meals, and performed household chores. *Id.*  
12 (citing Tr. 55-56, 248-55, 382, 356). Plaintiff does not challenge this finding, ECF  
13 No. 17 at 5-9, thus, any challenge is waived. *See Carmickle v. Comm'r, Soc. Sec.*  
14 *Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (determining Court may decline  
15 to address on the merits issues not argued with specificity); *Kim v. Kang*, 154 F.3d  
16 996, 1000 (9th Cir. 1998) (the Court may not consider on appeal issues not  
17 "specifically and distinctly argued" in the party's opening brief).

18 The ALJ found Plaintiff had experienced no episodes of decompensation  
19 which have been of extended duration. Tr. 23. Plaintiff does not challenge this  
20

1 finding, ECF No. 17 at 5-9, thus any challenge is waived. *See Carmickle*, 533 F.3d  
2 at 1161 n.2; *Kim*, 154 F.3d at 1000.

3       The ALJ found Plaintiff had moderate difficulties in social functioning. Tr.  
4 23. Social functioning refers to a claimant’s “capacity to interact independently,  
5 appropriately, effectively, and on a sustained basis with other individuals” and  
6 includes “the ability to get along with others, such as family members, friends,  
7 neighbors, grocery clerks, landlords, or bus drivers.” 20 C.F.R. § 404, Subpart P,  
8 Appendix I. The ALJ observed Plaintiff reported that she isolated herself from  
9 others, but that she also shopped in stores and independently attended medical  
10 appointments. Tr. 23. Plaintiff challenges the ALJ’s conclusion, arguing that  
11 Plaintiff needed assistance with shopping, had difficulty attending medical  
12 appointments, and that the ALJ ignored medical evidence of Plaintiff’s social  
13 difficulties. ECF No. 17 at 6-7. The Court must consider the ALJ’s decision in the  
14 context of “the entire record as a whole,” and if the “evidence is susceptible to  
15 more than one rational interpretation, the ALJ’s decision should be upheld.” *Ryan*  
16 *v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (internal quotation  
17 marks omitted). Although Plaintiff testified that she needed her mother with her to  
18 go to the grocery store, she also testified that she was able to go to convenience  
19 stores on her own and that she was able to shop for a few things at a time on her  
20 own. Tr. 55-56. Plaintiff’s counseling record reflects that Plaintiff was able to

1 attend counseling appointments independently, except for a handful of  
2 appointments where Plaintiff brought her children with her. Tr. 409-534; *see* Tr.  
3 415, 458. The ALJ also observed throughout the record that Plaintiff had  
4 supportive relationships with several family members. Tr. 27; *see* Tr. 375  
5 (Plaintiff reported she has no friends because she keeps busy with her family); Tr.  
6 250 (Plaintiff reported receiving regular support and encouragement from her sister  
7 and her mother). The ALJ's conclusion of moderate limitations in social  
8 functioning is a reasonable interpretation of the evidence. This finding is  
9 supported by substantial evidence.

10       The ALJ found Plaintiff had moderate difficulties in concentration,  
11 persistence, or pace. Tr. 23. Concentration, persistence, or pace refers to a  
12 claimant's "ability to sustain focused attention and concentration sufficiently long  
13 to permit the timely and appropriate completion of tasks commonly found in work  
14 settings." 20 C.F.R. § 404, Subpart P, Appendix I. The ALJ observed some of  
15 Plaintiff's mental status examinations showed no scattered or disorganized  
16 thoughts, and that Plaintiff reported she was thrifty and could make money go a  
17 long way, indicating Plaintiff had sufficient concentration capabilities to budget.  
18 Tr. 23. Plaintiff argues that this finding was not supported by substantial evidence,  
19 citing a series of mental status examinations that show scattered or disorganized  
20 thoughts. ECF No. 17 at 9; *see* Tr. 414, 416, 418, 420, 423, 427, 429, 432. Even if

1 the ALJ's finding regarding Plaintiff's mental status examinations was not  
2 supported by substantial evidence, such error is harmless. An error is harmless  
3 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."  
4 *Molina*, 674 F.3d at 1115 (quotation and citation omitted). The Court may not  
5 reverse the ALJ's decision for an error that is harmless. *Id.* at 1111. As discussed  
6 *supra*, Plaintiff did not establish any of the other Paragraph B criteria. Therefore,  
7 even if the ALJ should have found more than moderate difficulties in Plaintiff's  
8 concentration, persistence, and pace, the step three finding would remain the same  
9 because Plaintiff did not establish at least two of the Paragraph B criteria. Plaintiff  
10 is not entitled to remand on these grounds.

#### 11 **B. Plaintiff's Symptom Testimony**

12 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
13 convincing in discrediting her symptom claims. ECF No. 17 at 16-21. An ALJ  
14 engages in a two-step analysis to determine whether a claimant's testimony  
15 regarding subjective pain or symptoms is credible. "First, the ALJ must determine  
16 whether there is objective medical evidence of an underlying impairment which  
17 could reasonably be expected to produce the pain or other symptoms alleged."  
18 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not  
19 required to show that her impairment could reasonably be expected to cause the  
20 severity of the symptom she has alleged; she need only show that it could

1 reasonably have caused some degree of the symptom.” *Vasquez v. Astrue*, 572  
2 F.3d 586, 591(9th Cir. 2009) (internal quotation marks omitted).

3 Second, “[i]f the claimant meets the first test and there is no evidence of  
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting  
7 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). “General findings are  
8 insufficient; rather, the ALJ must identify what testimony is not credible and what  
9 evidence undermines the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81  
10 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.  
11 2002) (“[T]he ALJ must make a credibility determination with findings sufficiently  
12 specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
13 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most  
14 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,  
15 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,  
16 924 (9th Cir. 2002)).

17 In assessing symptom complaints, the ALJ may consider, *inter alia*, (1) the  
18 claimant’s reputation for truthfulness; (2) inconsistencies in the claimant’s  
19 testimony or between her testimony and her conduct; (3) the claimant’s daily living  
20 activities; (4) the claimant’s work record; and (5) testimony from physicians or

1 third parties concerning the nature, severity, and effect of the claimant's condition.  
2 *Thomas*, 278 F.3d at 958-59.

3 The ALJ concluded that Plaintiff's medically determinable impairments  
4 could reasonably be expected to cause Plaintiff's alleged symptoms, but that  
5 Plaintiff's testimony about the intensity, persistence, and limiting effects of her  
6 symptoms were not entirely credible. Tr. 25.

7 *1. Reason for Stopping Work*

8 The ALJ found Plaintiff's symptom complaints were less credible because  
9 Plaintiff stopped working for reasons unrelated to her impairments. Tr. 25. An  
10 ALJ may consider that a claimant stopped working for reasons unrelated to the  
11 allegedly disabling condition in making a credibility determination. *See Bruton v.*  
12 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001). Here, the ALJ observed that  
13 Plaintiff testified that she left her waitress job at Denny's because of childcare  
14 issues and did not return to the job because she "didn't keep in good contact with  
15 them." Tr. 25; *see* Tr. 47-48. Plaintiff testified that she left a job at Shari's  
16 Restaurant because she "couldn't keep up" and "just quit going." Tr. 49. Plaintiff  
17 also testified that she left a prior job at Denny's because she gave birth to her son,  
18 then broke her leg and "didn't keep in contact, so they didn't hold my job." Tr. 50.  
19 Plaintiff similarly reported throughout the record that she stopped working to care  
20 for her children and reported waitressing on and off but being a stay at home mom

1 for most of her life. *See* Tr. 376, 544. The ALJ reasonably concluded that the  
2 record demonstrated that Plaintiff discontinued work for reasons other than her  
3 disability, which undermined the credibility of her subjective symptom complaints.  
4 Tr. 25.

5       2. *Inconsistent Statements*

6       The ALJ found Plaintiff's symptoms complaints were less credible because  
7 the record documented several inconsistent statements by Plaintiff. Tr. 25. In  
8 evaluating symptom claims, the ALJ may utilize ordinary techniques of evaluation  
9 of the evidence, including prior inconsistent statements. *See Smolen v. Chater*, 80  
10 F.3d 1273, 1284 (9th Cir. 1996). Moreover, it is well-settled in the Ninth Circuit  
11 that conflicting or inconsistent statements concerning drug use can contribute to an  
12 adverse credibility finding. *Thomas*, 278 F.3d at 959.

13       The ALJ observed that Plaintiff's report that she sought CPS involvement by  
14 her own volition was inconsistent with treatment notes indicating that her  
15 counselor called for CPS intervention. *Compare* Tr. 53 ("I called CPS a few years  
16 ago, and asked them for help because I was overwhelmed") *with* Tr. 458  
17 ("[Plaintiff] was informed that due to the episode with her kids yesterday a CPS  
18 [sic] was placed"). The ALJ also observed that Plaintiff inconsistently reported her  
19 drug use history. Tr. 25. At the hearing, Plaintiff testified that she did not drink to  
20 the point of intoxication or blackout. Tr. 57. However, the record indicates

1 Plaintiff reported a history of heavy drinking, with at least one alcohol-related  
2 blackout. Tr. 382. Additionally, Plaintiff was diagnosed with acute alcohol  
3 intoxication when she presented to the emergency room for cutting her arm. Tr.  
4 677. At the hearing, Plaintiff testified that she was a young adult when she last  
5 used marijuana. Tr. 57. However, Plaintiff reported ongoing occasional marijuana  
6 use in April 2013, when Plaintiff was 42 years old. Tr. 381-82. Later, in  
7 September 2013, Plaintiff reported that her last marijuana use was one year ago.  
8 Tr. 535. The ALJ reasonably concluded that these inconsistencies in Plaintiff's  
9 testimony undermined the credibility of her testimony. Tr. 25. This was a clear  
10 and convincing reason to discredit Plaintiff's subjective symptom testimony.

### 11 *3. Inconsistency with the Medical Evidence*

12 The ALJ found that Plaintiff's symptom complaints exceeded the level of  
13 impairment supported by the objective medical evidence of record. Tr. 25. An  
14 ALJ may not discredit a claimant's symptom testimony and deny benefits solely  
15 because the degree of the symptoms alleged is not supported by objective medical  
16 evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v.*  
17 *Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601  
18 (9th Cir. 1989). However, the medical evidence is a relevant factor in determining  
19 the severity of a claimant's impairment and its disabling effects. *Rollins*, 261 F.3d  
20 at 857; 20 C.F.R. § 416.929(c)(2).



1 First, the ALJ found Plaintiff's symptom complaints were inconsistent with  
2 the record of her positive response to treatment. Tr. 26-27. The effectiveness of  
3 treatment is a relevant factor in determining the severity of a claimant's symptoms.  
4 20 C.F.R. § 416.929(c)(3) (2011); *see also Tommasetti v. Astrue*, 533 F.3d 1035,  
5 1040 (9th Cir. 2008) (a favorable response to treatment can undermine a claimant's  
6 complaints of debilitating pain or other severe limitations). Here, the ALJ noted  
7 that the record showed Plaintiff's symptoms showed improvement with medication  
8 and counseling. Tr. 25; *see* Tr. 419 (Plaintiff reported in March 2013 that her  
9 current medications helped stabilize her mood); Tr. 569 (Plaintiff reported in  
10 March 2013 that she felt good for the first time); Tr. 417 (Plaintiff reported in May  
11 2013 that Clonidine was helpful for her anxiety); Tr. 415 (Plaintiff reported in May  
12 2013 that medication helped her control her bipolar symptoms and Clonidine  
13 worked well at controlling her anxiety symptoms); Tr. 624 (Plaintiff's counselor  
14 reported in August 2013 that Plaintiff's mood and level of functioning improved  
15 after participating in counseling). Plaintiff cites to evidence of mental status  
16 examinations showing impairment, arguing that the ALJ mischaracterized the  
17 evidence as a whole. ECF No. 17 at 17. However, where the ALJ's interpretation  
18 of the record is reasonable, as it is here, it should not be second-guessed. *Rollins*,  
19 261 F.3d at 857. This was a clear and convincing reason to discredit Plaintiff's  
20 subjective symptom testimony.

1 Second, the ALJ found Plaintiff's symptom complaints were inconsistent  
2 with her record of conservative treatment, notably Plaintiff's failure to engage in  
3 recommended counseling services. Tr. 25-26. It is well-established that  
4 unexplained or inadequately explained non-compliance with treatment reflects on a  
5 claimant's credibility. *See Molina*, 674 F.3d at 1113-14; *Tommasetti*, 533 F.3d at  
6 1039; *see also Smolen*, 80 F.3d at 1284 (an ALJ may consider a claimant's  
7 unexplained or inadequately explained failure to follow a prescribed course of  
8 treatment when assessing a claimant's credibility).

9 Here, the ALJ noted that Plaintiff declined to participate in counseling,  
10 despite numerous recommendations to do so. Tr. 26, 28. The record shows  
11 Plaintiff's treating counselor recommend Plaintiff continue counseling in April  
12 2013. Tr. 519-20. Examining provider Dr. Harmon similarly recommended goal-  
13 focused mental health support, such as cognitive-behavioral treatment, in April  
14 2013. Tr. 753. Plaintiff's treating counselor again recommended continued  
15 services in July 2013. Tr. 455. Upon moving to California in approximately  
16 November 2013, Plaintiff established care with a new provider who recommended  
17 Plaintiff pursue group therapy. Tr. 550. Plaintiff later returned to Washington and  
18 was again encouraged by a treating provider to pursue mental health treatment in  
19 October 2014. Tr. 825. However, the record as a whole shows Plaintiff did not  
20 engage in counseling after July 2013. Tr. 455, 623-24. Plaintiff testified at the

1 hearing that she used to go to counseling, but did not go anymore. Tr. 51. She  
2 further testified that nothing at home prevented her from going to counseling and  
3 that she “really just [didn’t] want to go” back to counseling. Tr. 51-52. The ALJ  
4 reasonably interpreted Plaintiff’s record of declining to participate in  
5 recommended counseling as being inconsistent with the level of impairment  
6 Plaintiff alleged. Tr. 25. This was a clear and convincing reason to discredit  
7 Plaintiff’s subjective symptom complaints.

#### 8 *4. Activities of Daily Living*

9 The ALJ found Plaintiff’s activities of daily living were inconsistent with the  
10 level of impairment she alleged. Tr. 27. A claimant’s reported daily activities can  
11 form the basis for an adverse credibility determination if they consist of activities  
12 that contradict the claimant’s “other testimony” or if those activities are  
13 transferable to a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007);  
14 *see also Fair*, 885 F.2d at 603 (daily activities may be grounds for an adverse  
15 credibility finding “if a claimant is able to spend a substantial part of his day  
16 engaged in pursuits involving the performance of physical functions that are  
17 transferable to a work setting.”). “While a claimant need not vegetate in a dark  
18 room in order to be eligible for benefits, the ALJ may discredit a claimant’s  
19 testimony when the claimant reports participation in everyday activities indicating  
20 capacities that are transferable to a work setting” or when activities “contradict

1 claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1112-13 (internal  
2 quotation marks and citations omitted).

3       The record shows Plaintiff was able to independently engage in daily  
4 activities during the relevant period. *See* Tr. 374 (Plaintiff reported helping her  
5 children, grooming herself, housecleaning, washing clothes, shopping for food, and  
6 preparing light meals); Tr. 382 (Plaintiff managed her daily activities on her own  
7 and looked after her children); Tr. 536 (Plaintiff “does all of her activities of daily  
8 living, including some household works”). Plaintiff was able to complete these  
9 daily activities while also caring for three young children. Tr. 248-49 (Plaintiff  
10 reported feeding, grooming, and dressing her children, ages four, six, and seven).  
11 Although Plaintiff testified at the hearing that she could no longer go to the grocery  
12 store alone, she also testified that she was able to go to convenience stores or pick  
13 up a few items on her own. Tr. 55-56. Plaintiff argues that Plaintiff’s daily  
14 activities as performed are consistent with the level of impairment she alleged.  
15 ECF No. 17 at 20. However, where evidence is subject to more than one rational  
16 interpretation, the ALJ’s conclusion will be upheld. *Burch*, 400 F.3d at 679. The  
17 ALJ reasonably concluded that Plaintiff’s ability to independently perform  
18 activities of daily living indicated that her impairments were not as severe as  
19 alleged. Tr. 27. This was a clear and convincing reason to discredit Plaintiff’s  
20 symptom testimony.

1       **C. Medical Opinion Evidence**

2           Plaintiff challenges the ALJ's consideration of the medical opinions of  
3 David Sandvik, M.D.; Dana Harmon, Ph.D.; and Susana Dinges, L.M.H.C. ECF  
4 No. 17 at 9-16.

5           There are three types of physicians: "(1) those who treat the claimant  
6 (treating physicians); (2) those who examine but do not treat the claimant  
7 (examining physicians); and (3) those who neither examine nor treat the claimant  
8 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).  
9 Generally, a treating physician's opinion carries more weight than an examining  
10 physician's, and an examining physician's opinion carries more weight than a  
11 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight  
12 to opinions that are explained than to those that are not, and to the opinions of  
13 specialists concerning matters relating to their specialty over that of  
14 nonspecialists." *Id.* (citations omitted).

15           If a treating or examining physician's opinion is uncontradicted, the ALJ  
16 may reject it only by offering "clear and convincing reasons that are supported by  
17 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
18 "However, the ALJ need not accept the opinion of any physician, including a  
19 treating physician, if that opinion is brief, conclusory and inadequately supported  
20

1 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or  
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ  
4 may only reject it by providing specific and legitimate reasons that are supported  
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-  
6 831).

7 *1. Dr. Sandvik*

8 Dr. Sandvik examined Plaintiff on September 7, 2012, and opined that  
9 “[w]ith the complications of her family and her physical problems, it is difficult to  
10 imagine that she could manage the stress of full time employment. Perhaps she  
11 could work part-time, especially intermittently for brief periods, but this would  
12 depend on her being fairly healthy physically.” Tr. 374-76. The ALJ gave this  
13 opinion little weight. Tr. 28. Because Dr. Sandvik’s opinion was contradicted by  
14 Dr. Clifford, Tr. 93-95, the ALJ was required to provide specific and legitimate  
15 reasons for rejecting the opinion. *Bayliss*, 427 F.3d at 1216.

16 First, the ALJ discredited Dr. Sandvik’s opinion as being based on Plaintiff’s  
17 self-reports. Tr. 28. A physician’s opinion may be rejected if it based on a  
18 claimant’s subjective complaints which were properly discounted. *Tonapetyan v.*  
19 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v. Comm’r of Soc. Sec*  
20 *Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair*, 885 F.2d at 604. “[W]hen an

1 opinion is not more heavily based on a patient's self-reports than on clinical  
2 observations, [this] is no evidentiary basis for rejecting the opinion." *Ghanim*, 763  
3 F.3d at 1162. Dr. Sandvik's report contains a combination of Plaintiff's self-  
4 reports and findings from a mental status examination, and does not reference a  
5 review of any medical records. Tr. 374-76. However, Dr. Sandvik's opinion  
6 regarding Plaintiff's ability to work is qualified with specific consideration of  
7 Plaintiff's family stressors and physical symptoms, which are not measured on the  
8 mental status examination. Tr. 375-76. Therefore, the ALJ reasonably concluded  
9 that Dr. Sandvik's opinion was more heavily based on Plaintiff's self-reports than  
10 clinical observations. Tr. 28. Because the ALJ properly discredited Plaintiff's  
11 symptom complaints, as discussed *supra*, this was a specific and legitimate reason  
12 to discredit Dr. Sandvik's opinion.

13       Second, the ALJ discredited Dr. Sandvik's opinion as vague and for failure  
14 to provide any functional assessments. Tr. 28. The Social Security regulations  
15 "give more weight to opinions that are explained than to those that are not."  
16 *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the opinion of any  
17 physician, including a treating physician, if that opinion is brief, conclusory and  
18 inadequately supported by clinical findings." Furthermore, an ALJ may reject an  
19 opinion that does "not show how [a claimant's] symptoms translate into specific  
20 functional deficits which preclude work activity." *See Morgan*, 169 F.3d at 601.

1 Dr. Sandvik’s opined limitations are equivocal, as Dr. Sandvik only opined “it is  
2 difficult to imagine” that Plaintiff could maintain full-time employment, and  
3 “*perhaps* she could work part-time.” Tr. 376 (emphasis added). Dr. Sandvik  
4 provided no further explanation of his opinion about Plaintiff’s capacity to work.  
5 Furthermore, Dr. Sandvik did not provide any function-by-function analysis of  
6 Plaintiff’s functional limitations or explanation of how her impairments “might  
7 limit [her] ability to work on a sustained basis.” *Id.*; *Morgan*, 169 F.3d at 601.  
8 The ALJ reasonably discredited these findings as vague and not sufficiently  
9 explained. Tr. 28. This was a specific and legitimate reason to discredit Dr.  
10 Sandvik’s opinion.

11 Third, the ALJ discredited Dr. Sandvik’s opinion as being outside his area of  
12 expertise. Tr. 28. A medical provider’s specialization is a relevant consideration  
13 in weighing medical opinion evidence. 20 C.F.R. § 416.927(c)(5). As a  
14 psychiatrist, Dr. Sandvik’s area of expertise is not physical functioning. *See*  
15 *Fithian v. Berryhill*, No. 3:16-cv-932-SI, 2017 WL 1502801, at \*8 (D. Or. Apr. 26,  
16 2017) (“[A]ll psychiatrists are M.D.’s, and although some psychiatrists may treat  
17 or specialize in physical impairments, not all do. Thus the mere fact that Dr. Jones  
18 is an M.D. does not mean her physical-limitation opinion deserves controlling  
19 weight.”); *Williams v. Colvin*, No. 2:14-cv-00213-FVS, 2015 WL 5039911, at \*8  
20 (E.D. Wash. Aug. 26, 2015) (citing *Brosnahan v. Barnhart*, 336 F.3d 671, 676 (8th



1 Cir. 2003)) (finding physical limitations were beyond the expertise of  
2 psychologist). Dr. Sandvik's opinion regarding Plaintiff's functioning is  
3 specifically qualified with consideration to Plaintiff's physical health. Tr. 376. Dr.  
4 Sandvik did not physically examine Plaintiff or review any records of her physical  
5 functioning. Tr. 374-76. The ALJ reasonably credited the opinion of Dr.  
6 Spackman, a reviewing expert who reviewed the longitudinal record, about  
7 Plaintiff's physical functioning over that of Dr. Sandvik, who did no such review  
8 and whose specialty is psychiatry. Tr. 29. This was a specific and legitimate  
9 reason to discredit Dr. Sandvik's opinion.

10       2. *Dr. Harmon*

11       Dr. Harmon examined Plaintiff on April 25, 2013, and opined that Plaintiff  
12 had moderate impairments in her ability to understand, remember, and persist in  
13 tasks by following detailed instructions; perform activities within a schedule,  
14 maintain regular attendance, and be punctual within customary tolerances without  
15 special supervision; learn new tasks; adapt to changes in a routine work setting;  
16 maintain appropriate behavior in a work setting; and set realistic goals and plan  
17 independently; that Plaintiff had marked impairments in her ability to  
18 communicate and perform effectively in a work setting and complete a normal  
19 work day and work week without interruptions from psychologically based  
20 symptoms; that Plaintiff's impairments would endure for six to twelve months; and

1 that Plaintiff did not appear to be appropriate for SSI/SSDI facilitation because she  
2 had been able to work and function fairly well in the past and should be able to  
3 return to work within the next six to twelve months. Tr. 381-83. The ALJ gave  
4 significant weight to Dr. Harmon's conclusion that Plaintiff did not appear to be  
5 appropriate for SSI/SSDI, but gave no weight to Dr. Harmon's opinion about  
6 marked limitations. Because Dr. Harmon's opinion was contradicted by Dr.  
7 Clifford, Tr. 93-95, the ALJ was required to provide specific and legitimate  
8 reasons for rejecting the opinion. *Bayliss*, 427 F.3d at 1216.

9 First, the ALJ found Dr. Harmon's opinion was inconsistent with the  
10 longitudinal evidence. Tr. 28. An ALJ may discredit physicians' opinions that are  
11 unsupported by the record as a whole. *Batson v. Comm'r of Soc. Sec. Admin.*, 359  
12 F.3d 1190, 1195 (9th Cir. 2004). Here, the ALJ noted that Dr. Harmon opined  
13 marked limitations in her ability to communicate effectively in a work setting and  
14 complete a normal work day and work week without interruptions from  
15 psychologically based symptoms. Tr. 28. The ALJ found these limitations were  
16 inconsistent with Plaintiff's record of being able to attend medical appointments  
17 independently.<sup>1</sup> See Tr. 409-534. Plaintiff argues that this finding is not supported

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18  
19 <sup>1</sup> The ALJ also found that these limitations were inconsistent with Plaintiff's ability  
20 to meet court requirements in order to "get her children back." Tr. 28. The

1 because Ms. Dinges' discredited opinion indicated that Plaintiff's difficulties in  
2 making her appointments were attributable to anxiety. Tr. 786. The Court may not  
3 reverse the ALJ's decision based on Plaintiff's disagreement with the ALJ's  
4 interpretation of the record. *See Tommasetti*, 533 F.3d at 1038 ("[W]hen the  
5 evidence is susceptible to more than one rational interpretation" the court will not  
6 reverse the ALJ's decision). The ALJ reasonably interpreted the record as a whole  
7 as showing a pattern of independently attending appointments that was inconsistent  
8 with the level of limitation Dr. Harmon opined. Tr. 28. This was a specific and  
9 legitimate reason to discredit Dr. Harmon's opinion.

10 Second, the ALJ found Dr. Harmon's opinion was internally consistent. Tr.  
11 28. Relevant factors to evaluating any medical opinion include the amount of  
12 relevant evidence that supports the opinion, the quality of the explanation provided  
13 in the opinion, and the consistency of the medical opinion with the record as a  
14 whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Moreover, a

15 \_\_\_\_\_  
16 Commissioner declines to rely on this finding, "because it does not appear from the  
17 record that there were court requirements for Plaintiff to get her children back."  
18 ECF No. 21 at 12. The Court notes that Plaintiff testified that she complied with  
19 CPS's requirement that she attend counseling after Plaintiff cut her arm and while  
20 her children stayed with her mother. Tr. 53-54.

1 physician's opinion may be rejected if it is unsupported by the physician's  
2 treatment notes. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003).  
3 Here, the ALJ noted that Dr. Harmon opined several moderate and marked  
4 limitations. Tr. 28; *see* Tr. 383. However, the ALJ also noted that Dr. Harmon  
5 recommended Plaintiff participate in vocational training. *Id.* Dr. Harmon  
6 specifically opined that Plaintiff would be able to return to work within six to  
7 twelve months with mental health support, medication, and vocational training. Tr.  
8 383. The ALJ reasonably concluded that Dr. Harmon's opinion that Plaintiff could  
9 return to work with vocational training was inconsistent with Dr. Harmon's opined  
10 marked limitations. Because this is a reasonable interpretation of the evidence, the  
11 Court defers to the ALJ's finding. *Burch*, 400 F.3d at 679. This was a specific and  
12 legitimate reason to discredit Dr. Harmon's opinion.

### 13 3. *Ms. Dinges*

14 Ms. Dinges, Plaintiff's treating counselor, opined on August 15, 2012, that  
15 Plaintiff had difficulties with following instructions, difficulties concentrating on  
16 tasks for more than five minutes, that Plaintiff was unable to follow directions, that  
17 Plaintiff had difficulty sitting still for long periods of time, that Plaintiff was  
18 unable to understand at times and got easily confused when asked questions, and  
19 that Plaintiff was limited to sedentary work. Tr. 785-86. The ALJ gave this  
20 opinion minimal weight. Tr. 28. Ms. Dinges does not qualify as an acceptable

1 medical source. 20 C.F.R. § 416.902<sup>2</sup> (Acceptable medical sources are licensed  
2 physicians, licensed or certified psychologists, licensed optometrists, licensed  
3 podiatrists, qualified speech-language pathologists, licensed audiologists, licensed  
4 advanced practice registered nurses, and licensed physician assistants). An ALJ is  
5 required to consider evidence from non-acceptable medical sources. 20 C.F.R. §  
6 416.927(f).<sup>3</sup> The opinions of non-acceptable medical sources “should be evaluated  
7 under the same factors as all other medical opinions.” *Eckermann v. Astrue*, 817 F.  
8 Supp. 2d 1210, 1221-22 (D. Id. 2011) (citing SSR 06-03p). An ALJ must give  
9 reasons “germane” to each source in order to discount evidence from non-  
10 acceptable medical sources. *Ghanim*, 763 F.3d at 1161.

11 First, the ALJ found Ms. Dinges’ opinion was entitled to less weight because  
12 it was rendered prior to the alleged onset date. Tr. 28. Medical opinions from  
13 before the alleged onset date are of limited relevance to the ALJ’s disability  
14 determination. *Carmickle*, 533 F.3d at 1165. Plaintiff’s alleged onset date in this  
15 claim is September 29, 2012. Tr. 198. Ms. Dinges’ opinion was rendered on  
16 \_\_\_\_\_

17 <sup>2</sup> Prior to March 27, 2017, the definition of an acceptable medical source was  
18 located at 20 C.F.R. § 416.913.

19 <sup>3</sup> Prior to March 27, 2017, the requirement that an ALJ consider evidence from  
20 non-acceptable medical sources was located at 20 C.F.R. § 416.913(d).

1 August 15, 2012. Tr. 787. Indeed, Ms. Dinges' opinion was rendered during the  
2 relevant period of Plaintiff's prior SSI claim, in which the Commissioner  
3 determined Plaintiff was not disabled between May 1, 2009, and September 28,  
4 2012. Tr. 75-84, 114-17. The timing of Ms. Dinges' opinion was a germane  
5 reason for the ALJ to discredit Ms. Dinges' opinion.

6 Second, the ALJ found Ms. Dinges' opinion was based on Plaintiff's self-  
7 reports, which the ALJ found were less than credible. Tr. 29. A physician's  
8 opinion may be rejected if it based on a claimant's subjective complaints which  
9 were properly discounted. *Tonapetyan*, 242 F.3d at 1149; *Morgan*, 169 F.3d at  
10 602; *Fair*, 885 F.2d at 604. "[W]hen an opinion is not more heavily based on a  
11 patient's self-reports than on clinical observations, [this] is no evidentiary basis for  
12 rejecting the opinion." *Ghanim*, 763 F.3d at 1162. The ALJ found Ms. Dinges'  
13 opinion was based mostly on Plaintiff's self-reports. Tr. 29. Ms. Dinges' opinion  
14 indicates that it is supported by Plaintiff's psychiatric progress notes. Tr. 785. A  
15 review of Ms. Dinges' treatment notes up until the date she rendered her opinion  
16 reveals that the notes largely record Plaintiff's complaints and do not document  
17 objective testing results. Tr. 770-82. The ALJ reasonably concluded that Ms.  
18 Dinges' opinion was mostly based on Plaintiff's self-reports, Tr. 28-29, and as  
19 discussed *supra*, the ALJ properly discredited Plaintiff's subjective symptom

1 testimony. This was a germane reason for the ALJ to discredit Ms. Dinges'  
2 opinion. These two reasons alone were sufficient to reject Ms. Dinges' opinions.

3 Third, the ALJ further found Ms. Dinges rendered opinions on physical  
4 functioning, which the ALJ found were outside her area of expertise. Tr. 28-29. A  
5 medical provider's specialization is a relevant consideration in weighing medical  
6 opinion evidence. 20 C.F.R. § 416.927(c)(5). As a LMHC, Plaintiff's physical  
7 functioning is outside the scope of Ms. Dinges' expertise. *See Williams*, 2015 WL  
8 5039911 at \*8 (citing *Brosnahan*, 336 F.3d at 676). The ALJ reasonably credited  
9 the opinion of Dr. Spackman, a reviewing expert who reviewed the longitudinal  
10 record, about Plaintiff's physical functioning over that of Ms. Dinges. Tr. 29. This  
11 was a germane reason for the ALJ to discredit Ms. Dinges' opinion.

## 12 CONCLUSION

13 Having reviewed the record and the ALJ's findings, this court concludes the  
14 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
15 Accordingly, **IT IS HEREBY ORDERED:**

- 16 1. Plaintiff's Motion for Summary Judgment, ECF No. 17, is DENIED.
- 17 2. Defendant's Motion for Summary Judgment, ECF No. 21, is GRANTED.
- 18 3. The Court enter JUDGMENT in favor of Defendant.

19 The District Court Executive is directed to file this Order, provide copies to  
20 counsel, and CLOSE THE FILE.

1 DATED September 4, 2018.

2 s/Mary K. Dimke

3 MARY K. DIMKE

4 UNITED STATES MAGISTRATE JUDGE